85-1384

No. 85-1304

IN THE

Supreme Court of the United States

October Term, 1986

WILLIAM TURNER, et al., and DR. LEROY BLACK, et al.,

Petitioners,

—v.—

LEONARD SAFLEY, et al., and MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE CORRECTIONAL ASSOCIATION OF NEW YORK, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Correctional Association of New York (the "Correctional Association") moves pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief *amicus curiae* in support of respondents. The written consent of respondents has been filed with the Court. Although petitioners have advised the Correctional Association that they do not oppose this motion, they have not consented to the filing of this brief.

The Correctional Association is a private, nonprofit civic organization founded in 1844. It is vested with authority from the New York Legislature to visit prisons and to report to the Legislature its findings and recommendations concerning prison conditions and corrections policy. Act to Incorporate

the Prison Association of New York, ch. 163, 1846 N.Y. Laws 175 (*amended by* Act of June 5, 1973, Ch. 398, 1973 N.Y. Laws 757).

Since its formation, the Correctional Association has been a close observer of the jails and the prisons in New York State and has examined and reported on the effect of family ties, especially the marital relationship, on prison conditions and corrections policy. The Association is acutely interested in the issue of inmates' right to marry during incarceration because it believes, based on empirical studies and its own observation, that marriage has a positive effect on inmate morale and discipline during incarceration and reduces recidivism after release.

The Correctional Association has an interest in the Court's resolution in this case of the issues relating to the rules and practices of the Missouri Department of Corrections concerning inmate marriage during incarceration. In light of its legislative authority and responsibility to investigate prison issues and to report and make recommendations to the New York State Legislature concerning corrections policy, the Correctional Association believes it will present to the Court a valuable perspective on the issues in this case relating to inmate marriages.

Respectfully submitted,

/s/ JOHN H. HALL
John H. Hall

Dated: September 8, 1986
New York, New York

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BRIEF OF THE CORRECTIONAL ASSOCIATION OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

A motion for leave to file this brief is being presented today on behalf of the Correctional Association of New York (the "Correctional Association") pursuant to Rule 36.3 of the Rules of this Court. The interests of the Correctional Association are set forth in its motion, which is bound with this brief pursuant to rule 36.3. The Correctional Association has appeared as an *amicus curiae* before this Court and before other courts in several previous cases relating to prison conditions and corrections policy.

The Correctional Association seeks to file this brief *amicus curiae* because it believes that the right to marry is a fundamental right that deserves full constitutional protection in a prison setting and that any substantial impairment of that right would undermine rather than advance important penological interests.

STATEMENT OF THE CASE

This case presents the question of whether the regulations and practices of the Missouri Department of Corrections with respect to marriages of prison inmates are consistent with the constitutional protection of the right to marry. Respondents challenged the regulations and practices of the Missouri Department of Corrections on the ground that they empower prison officials to determine the acceptibility of the prospective marriage partners and the merits of a marriage, and have effectively prevented the formation of a marital relationship during incarceration except to legitimize a child.[1]

The marriage regulation initially challenged by respondents set forth the procedure to be followed when an inmate requested permission to marry.[2] The regulation did not obligate prison officials to assist an inmate who wanted to get married, but it did not expressly authorize such officials to prohibit inmates from marrying. *Safley v. Turner*, 586 F. Supp. 589, 592 (W.D. Mo. 1984). After respondents commenced this litigation in 1983, the regulation was revised. The new regulation permitted an inmate to marry but only with the approval of the prison superintendent upon a convincing showing that there were compelling reasons therefor. *Id.* In practice under both regulations, petitioners denied inmates' requests to marry,

1 This case also involves a challenge to a regulation restricting inmate to inmate correspondence. We do not address that issue in this brief.

2 The regulations apply both to marriages between an inmate and non-prisoner and to marriages between inmates. Petitioners Brief at 40 (hereinafter designated as "Pet. Br.").

except when the prospective marriage partners had either conceived or had a child that would be illegitimate without the marriage. *Id.*

A class was certified by the district court including inmates and non-prisoners "who desire to . . . marry inmates of Missouri correctional institutions and whose rights of . . . marriage have been or will be violated by employees of the Missouri Division of Corrections." Pet. Br. at 3 n.1.

In support of the marriage regulations, petitioners contended at trial that prison officials have the inherent authority to regulate inmate marriages pursuant to their statutory authority to control the prison institution. Vol. I at 70, 168-69.[3] Petitioners further contended that since prison officials are responsible for rehabilitating inmates, they have the authority to bar marriages that they consider detrimental to inmate rehabilitation. Vol. I at 75-76, 180, 184; Vol. II at 66-67; Vol. IV at 199-200. In addition, petitioners contended that marriages between inmates pose the risk of escape and manipulation of inmates and that possible "love triangles" would generate violent confrontations between inmates. Vol. IV at 32-33, 231-233.[4]

On May 7, 1984, the district court held that the marriage regulations and practices constituted an unjustified denial of the right to marry. 586 F. Supp. at 594-95. Relying principally on *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983), the court concluded that each of the marriage regulations

> unconstitutionally infringes upon [respondent's] right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state

3 References to the transcript of trial are designated herein as "Vol. ___ at [page]."

4 Petitioners continue to advance these justifications before the Court. See Pet. Br. at 13, 31-34.

security interest, or any other legitimate interest, such as rehabilitation of inmates.

586 F. Supp. at 594. The district court ordered the parties to submit jointly proposed regulations in accordance with its decision. Resp. Br. at 3.[5] The district court approved the proposed regulations, and petitioners adopted them. *Id.* The court-approved marriage regulation permits any inmate to marry. *Id.*

On November 19, 1985, the Eighth Circuit unanimously affirmed. 777 F.2d 1307 (8th Cir. 1985). It held that inmates have ~~a~~ fundamental right to marry and rejected petitioners' contention that a prisoner has no right to have a marriage ceremony performed. *Id.* at 1313. The court held further that, in light of the fundamental nature of the right to marry and the fact that the regulations on their face and as applied deprived inmates of the right to marry, the district court properly analyzed the constitutionality of the regulations under the heightened scrutiny standard of *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974). 777 F.2d at 1314. The court of appeals also affirmed the conclusions of the district court that the regulations were not the least restrictive means of achieving the legitimate penological objectives asserted by petitioners. *Id.* at 1315.

5 References to the Brief for Respondents are designated herein as "Resp. Br.".

SUMMARY OF ARGUMENT

As this Court expressly recognized in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the right to marry is an aspect of the fundamental right to privacy protected under the due process clause of the United States Constitution. A person's right to marry maintains its status as a fundamental right during incarceration even though confinement necessarily limits or prevents participation in certain associational and intimate aspects of a marital relationship.

The regulations and practices challenged by respondents empower prison officials to make the overriding determination on the suitability of marriage partners and the merits of a marriage before any inmate can be married. Petitioners claim a right to such unfettered intrusion into the highly personal marriage decisions of adults in their custody based on their erroneous view that marriage is detrimental to prison goals and inconsistent with confinement. To the contrary, marriage has been demonstrated to be a highly positive influence in the prison environment. In addition, an individual's status as a prisoner and as a married person are not inconsistent although certain incidents of marriage are necessarily limited by confinement. In this respect, marriage is highly distinguishable from those rights—such as association and privacy in prison cells—which are amenable to a deferential standard of review.

Because marriage is inconsistent with neither penological goals nor confinement, restrictions on the right to marry in prison are unjustified unless incidental to the pursuit of legitimate penological objectives. Under such circumstances, the heightened standard of review established by the Court in *Procunier v. Martinez*, 416 U.S. 396 (1973), should apply. The *Martinez* standard effects the appropriate mutual accommodation between institutional needs and objectives and the demand of the Constitution when incidental restrictions are imposed on retained fundamental rights.

Accordingly, the Court should affirm the ruling of the Eighth Circuit that a heightened standard of review under *Procunier v. Martinez* is appropriate in evaluating whether the marriage regulations further a substantial governmental interest.

ARGUMENT

POINT I

AN INMATE'S RIGHT TO MARRY IS A PROTECTED ASPECT OF THE FUNDAMENTAL RIGHT OF PRIVACY.

A. The Marriage Relationship Is a Fundamental Constitutional Right.

This Court has consistently recognized that the right to marry is a fundamental personal right implicit in individual liberty. *Bowers v. Harwick*, ____ U.S.____, 106 S. Ct. 2841, 2843 (1986); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("[M]arriage involves interests of basic importance in our society"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("the freedom to marry has been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Marriage is "an association for as noble a purpose as any involved in our prior decisions."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Marriage is "fundamental to the very existence and survival of the race.")

Until *Zablocki*, the Court's recognition of the special solicitude accorded marriage in our society was incidental to its consideration of other zones of privacy implicit in the fourteenth amendment, such as: procreation, *Skinner v. Oklahoma*, 316 U.S. at 541-42; contraception, *Griswold v. Connecticut*, 381 U.S. at 485-86, 453-54; family relationships, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977);

child rearing and education, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 639-40 (1974). In *Zablocki*, the marital relationship was accorded constitutional protection distinct from, but equivalent to, that applied under the due process clause to the intimate aspects of the right of privacy. The Court pointed out:

> It is not surprising that the *decision to marry* has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to *the decision to enter into the relationship* that is the foundation of the family in our society.

Id. at 386 (emphasis added). The "individual's interest in making the marriage decision independently" was deemed to be sufficiently important to merit special constitutional protection. *Id.* at 404 (Stevens, J., concurring.). Accordingly, the Court stated after *Zablocki* that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting [other choices]." *Roberts v. United States*, 468 U.S. 609, 620 (1984).

B. The Constitutional Significance of the Marital Relationship Is Not Diluted by Incarceration.

Petitioners concede that the right to marry is a fundamental right. Pet Br. at 30. Nonetheless, they suggest, as they argued directly in the courts below, that inmates are not deprived of a constitutionally protected marital relationship by their denial of a marriage ceremony in prison, implying that a marriage formed during incarceration is not a real marriage. Pet Br. at 30, 38 n.6. For that proposition, petitioners rely on *Butler v. Wilson*, 415 U.S. 953 (1974), decided before *Zablocki*, which summarily affirmed the judgment of a three-judge district court in *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973). Pet. Br. at 30.

Johnson involved a challenge to the constitutionality of a New York statute which prohibited unmarried life inmates from marrying and terminated the marriages of persons sentenced to life imprisonment as a consequence of the imposition of a life sentence. The majority held that the statute did not violate the fundamental right to privacy by absolutely preventing inmates from marrying. The court reasoned that since the fact of incarceration prevented participation in the usual attributes of marriage—such as cohabitation, sexual relations and procreation—the only thing affected by the statute was a mere ceremony, not a fundamental constitutional right. *Johnson*, 365 F. Supp. at 380.[6]

Johnson represents an unduly restrictive view of marriage and is inconsistent with *Zablocki*.[7] Although certain rights of association and physical intimacy are necessarily limited by confinement, the remaining, unaffected elements of an inmate's marriage are substantial and meaningful. As the Eighth Circuit stated in rejecting the rationale of *Johnson*, inmate marriages, like others, possess all the same "elements of emotional support and public acknowledgement and commitment which are central to a marital relationship." *Safley v. Turner*, 777 F.2d at 1314. These aspects of inmates' marriages were summarized by Judge Lasker in his separate opinion in *Johnson*:

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6 The Court, in summarily affirming *Johnson*, did not necessarily decide that a marriage during confinement loses its constitutional protection because of the absence of cohabitation, sexual relations and procreation. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The Court would have affirmed the judgment in *Johnson* even if it recognized the fundamental nature of a marriage in prison but concluded that the governmental interest asserted by the state in support of the denial of the right—punishment of crime—was sufficiently important to justify the deprivation. In his separate concurring opinion in *Johnson*, Judge Lasker reached both conclusions. 365 F. Supp. at 381-82.

7 Since the pivotal criteria for constitutional protection in *Johnson* is participation in the intimate aspects of marriage, prior marriages and relationships that did not result in marriage before confinement would be equally affected.

> [T]he formalized commitment [of marriage] is vital not only as an emotional support during the period of incarceration, even if it be actually for life, but also as a solemn undertaking to the panoply of the marriage relationship in the event of the prisoner's release by parole or commutation, possibilities which become actualities in a significant number of cases. It is no answer that in such an event the parties would be free to marry, for the passage of years without the existence or possibility of even a formalized emotional commitment will almost certainly mean that the wife-to-have-been will have built her life elsewhere.

365 F. Supp. at 382 (Lasker, J., dissenting in part). Similarly, this Court recently recognized that "the constitutional shelter afforded [marriage] reflects the realization that individuals draw much of their emotional enrichment from close ties with others . . . ." *Roberts*, 468 U.S. at 619.

In addition, many marriages entail solemn religious commitments, not merely secular contracts.[8] For incarcerated individuals who request religious rather than civil ceremonies, the right to make a marriage decision is not merely "a vital personal right," *Loving v. Virginia*, 388 U.S. at 12, but an exercise of personal religious faith under the first amendment as well.[9] Such religious marriage commitments obviously can

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8 Almost every religion accords substantial spiritual significance to the commitment of marriage. For example, marriage is a "holy sacrament" for Catholics, *Code of Common Law* 411 (1983); a right of "holy matrimony" for Protestants, *Constitution & Canon: The Episcopal Church* 49 (1985); and a "sacred covenant of wedlock" for Jews, *Encyclopedia Judaica* 1032 (1971), *citing* Talmud (Ket. 7b).

9 This case does not present, and the Court need not decide, whether the deprivation of the right to participate in certain religious ceremonies violates the first amendment. Rather, the significance of the religious aspect of the marriage commitment demonstrates that inmate marriages, even without cohabitation and sexual intimacy, entail meaningful and substantial individual privacy interests.

be made without procreation and cohabitation. *E.g.*, Documents of Vatican II, *Church Today* at 255 (Abbott ed.); Elwell, *Evangelical Dictionary of Theology* 694 (1984); Borowitz, *Reading The Jewish Tradition on Marital Sexuality*, Journal of Reform Judaism 2 (1982).

Although the Court has never considered whether the absence or limitation of the intimate aspects of a marital relationship results in its loss of constitutional protection, most lower courts that have considered the question since *Zablocki* have concluded that such a marital relationship does not lose its constitutional status in prison. *See Safley v. Turner*, 777 F.2d at 1313; *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Lockert v. Faulkner*, 574 F. Supp. 606, 608-09 (N.D. Ind. 1983); *Salisbury v. List*, 501 F. Supp. 105, 108 (D. Nev. 1980); *In re Carrafa*, 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (1978); *cf. Vance v. Rice*, 524 F. Supp. 1297, 1299 (S.D. Iowa 1981) (pre-trial detainee). *Contra Wool v. Hogan*, 505 F. Supp. 928, 932 (D. Vt. 1981); *Holden v. Department of Corrections*, 400 So.2d 142 (Ct. App. Fla. 1981); *Department of Corrections v. Roseman*, 390 So.2d 394 (Ct. App. Fla. 1980).[10]

The premise of *Johnson* that a constitutionally protected marriage requires the demonstrable ability to participate in all of the elements of traditional marriage is antithetical to this Court's pronouncements in protecting personal liberties. *E.g.*, *Griswold v. Connecticut*, 381 U.S. at 485-86. In *Griswold*, a principal reason for the Court's invalidation of a statute prohibiting the use of contraceptives by a married woman was the offensive spectre of government investigations into such intimate conduct to determine whether the statute was violated. 381 U.S. at 485-86. The *Johnson* rationale requires the ability to participate in the intimate aspects of the right to privacy as a predicate to constitutional protection of the fundamental right to marry. The approach in *Johnson* represents judicial intrusion into intimate aspects of a relationship that, under *Zablocki*, is a part of the fundamental right to privacy. Just as courts should not scrutinize a marital relationship that is devoid of physical intimacies for other reasons—such as physical handicap, geographical separation or choice—they should refrain from such inquiry with respect to incarcerated individuals.[11]

The *Johnson* approach is constitutionally unacceptable today. The Court in *Roberts* made clear that the due process clause does not protect intimate conduct only, but rather "affords the formation and preservation of certain kinds of *highly personal relationships* a substantial measure of sanctuary from unjustified interference by the State." 468 U.S. at 618 (emphasis added). The decision to marry of an inmate and non-prisoner, or the decision of two inmates, represents the formation of such a personal relationship.

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10 Every pre-*Zablocki* decision of which we are aware denying the fundamental character of an inmate's right to marry has relied exclusively on *Butler v. Wilson*, 415 U.S. 953 (1974). *Hudson v. Rhodes*, 579 F.2d 46 (6th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 919 (1979); *Polmaskitch v. United States*, 436 F. Supp. 527 (W.D. Okla. 1977); *Muessman v. Ward*, 95 Misc. 2d 478, 408 N.Y.S.2d 254 (Sup. Ct. Queens Co. 1978); *cf. Fitzpatrick v. Smith*, 90 A.D.2d 974, 456 N.Y.S.2d 902 (4th Dep't 1982) (mem.), *aff'd mem.*, 59 N.Y.2d 916, 466 N.Y.S.2d 318, *cert. denied*, 464 U.S. 963 (1983).

11 In addition, the implicit premise in *Johnson* that an inmate's marriage is not a "real" marriage also ignores the meaningful opportunities that exist in prison to develop and maintain personal relationships, especially marital relationships. For example, the New York Department of Correctional Services permits contact visits. N.Y. Admin. Code tit. 7 § 200.4(k) (1986). In addition, the Family Reunion Program of the New York Department of Correctional Services permits approved inmates to participate at the prison in private weekend visits with legal spouse and other family members. N.Y. Admin. Code tit. 7 § 220 (1985). The primary objective of this program is to "preserve, enhance and strengthen family ties," with the goal of reducing further criminal activity after release. N.Y. Dep't. of Correctional Services, *Follow-up Survey of Participants in Family Reunion Program* 1 (1986). Because participation in the program is a privilege subject to the approval of prison officials, it also has a substantial, positive influence on behavior and discipline during incarceration. N.Y. Dep't. of Correctional Services, *The Family Reunion Program's Impact on Discipline* (1981).

POINT II

PRISON REGULATIONS WHICH DENY THE RIGHT TO MARRY SHOULD BE SUBJECTED TO A HEIGHTENED STANDARD OF REVIEW.

The regulations and practices challenged in this case affect the right of inmates to marry in two distinct ways—they regulate the procedures for entering into a marriage while in prison and they determine whether an inmate should be permitted to marry at all based on the acceptability of the marriage partners and the reasons. While prison officials may be accorded some measure of deference concerning the manner in which a marriage ceremony is performed in prisons, they should be held to a demanding standard when they seek to prohibit the formation of as venerated and highly personal a relationship as marriage.

We do not contend that prison administrators may not establish reasonable procedural criteria governing the performance of a marriage ceremony in prison. This would include reasonable regulations governing, for example, the number of participants and the day, time or location of the ceremony. Where such restrictions are rationally related to legitimate penological concerns, a deferential standard of review is properly applied. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Block v. Rutherford*, 468 U.S. 576 (1984). However, petitioners have far exceeded their authority to establish procedural criteria for prison weddings. Petitioners arrogate plenary power over the marriage decision and the choice of marriage partners. Marriage cannot be prohibited under the guise of setting regulations concerning the manner of entering into a marital relationship. *Zablocki v. Redhail*, 434 U.S. at 404 (Stevens, J., concurring); *cf. Boddie v. Connecticut*, 401 U.S. 371.

A. Marriage Is Fully Compatible with Penological Objectives.

Petitioners claim a right to unfettered authority over the merits and existence of marriage relationships in prison based on their view that marriage is inherently detrimental to prison goals and therefore is properly subject to absolute control in prison. Petitioners' bald assertions about inmate marriage are self-serving and distorted.

An inmate's decision to marry and, within certain limits, the marital relationship are neither inconsistent with confinement nor detrimental to legitimate penological objectives. Although an inmate's marital intimacy and association opportunities are necessarily limited as a result of confinement, the marriage union is not.

The official policies of numerous correctional agencies demonstrate that the right to marry is fully harmonious, not inconsistent, with penological concerns. The New York State Department of Correctional Services prison policies provide that "any inmate may marry providing there are no legal impediments to the marriage." Directive 4201 (1979).[12] Many states by statute or regulation similarly permit inmates to freely marry during incarceration. *See* Note, *Prison Inmate Marriages: A Survey and A Proposal*, 12 U. Rich. L. Rev. 443, 450-58 (1978). And, as the Solicitor General points out, "[t]here is no comparable federal regulation" relating to inmate marriages in the federal prison system. Brief for the United States, at 2. The American Bar Association Committee

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12 Directive No. 4201 provides in pertinent part:

> A major Departmental objective is to foster ties to the community that will help create stability in the inmate's personal life. The Department recognizes that a marriage can assist in creating that personal stability. Accordingly, the Department will provide appropriate assistance to inmates who wish to become married. The Department also recognizes that the person's confinement will in itself present impediments and difficulties to the contracting of a marriage during that period of confinement. . . . Any inmate may marry providing there are no legal impediments to the marriage.

on Standards for Criminal Justice also recommends that conviction or confinement should not deprive a person of the right to enter into a marriage. 4 ABA Standards for Criminal Justice, Standard 23-8.6 (2d Ed. 1980).

In addition, empirical studies demonstrate that family ties, especially the marital relationship, have a positive effect on inmates' morale and discipline during incarceration and reduce recidivism after release. *E.g*, Leg. Doc. 84, Memorandum of the Law Revision Commission of the New York State Legislature A-520, 529 (1984) (recommending repeal of statute restricting right to marry during life sentence) *citing* Cal. Dep't of Corrections, *Explorations in Inmate-Family Relationships*, (1972); Howser & MacDonald, *Maintaining Family Ties*, Corrections Today 96-98 (1982); N.Y. Dep't. of Correctional Services, *Follow-up Survey of Participants in Family Reunion Program* (1979); N.Y. Dep't. of Correctional Services, *Follow-up Survey of Post-Release Criminal Behavior of Participants in Family Reunion Program* (1980); N.Y. Dep't. of Correctional Services, *The Family Reunion Program's Impact on Discipline* (1981); and Howser, *Impact of Family Reunion Program on Institutional Discipline*, J. of Offender Counseling, Services & Rehabilitation 28 (1984).

Based on its experience with programs designed to maintain family and marital ties, The New York Department of Correctional Services has concluded that such ties are positively related to successful post-release adjustment and prison discipline. See n.10, *supra*. In addition, the Correctional Association, based on its own investigation, has submitted recommendations to the New York Legislature that such programs be expanded. The Correctional Association of New York, *State of the Prisons* 55 (1986). Thus, far from being detrimental to penological objectives, the stability and self-respect afforded by a marital relationship greatly enhances the attainment of penological goals.

B. Marriage Is Not Inconsistent with an Individual's Status as Prisoner or Necessarily Restricted by Confinement.

The fact that marriage does not by its nature implicate any legitimate penological concerns distinguishes it from those rights—such as the freedom to associate and to be free from unreasonable searches—which are necessarily restricted by confinement and therefore amenable to a deferential standard of review. *Jones*, 433 U.S. 119, *Wolfish*, 441 U.S. 520; *Rutherford*, 468 U.S. 576. The deferential standard of review does not apply where retention of the right and the goals of confinement are not mutually exclusive. *See Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (Kaufman, C.J.).

Jones involved the right to organize and solicit membership in an inmates' labor union. The Court recognized that such associational activity "would rank high on anyone's list of potential trouble spots" in prison. 433 U.S. at 133. *Wolfish* involved restrictions on items sent to pretrial detainees from outside the prison and limitations on physical privacy resulting from security searches. *Rutherford* also involved limitations on physical privacy and restrictions on contact visits.

Those rights are fundamentally inconsistent with life in prison. *Pell v. Procunier*, 417 U.S. 817, 826-27 (1983) (segregating convicted individuals is a "central task" of prison confinement); *Hudson v. Palmer*, 468 U.S. 517, 527 (1983) (privacy in prison is "fundamentally incompatible with the close and continued surveillance of inmates in their cells"). In those cases, the determinative factor for judicial deference to the discretion of prison officials was the fact that retention of the rights was irreconcilable with the central goals of prison confinement. Because the Court recognized that striking the appropriate balance necessarily entailed expertise concerning the prison environment, it adopted a deferential standard of review of state action affecting such rights. *Jones*, 433 U.S. at 132; *Wolfish*, 441 U.S. at 551; and *Rutherford*, 468 U.S. at 584-85.

By contrast, marriage and confinement obviously are not incompatible. Marriages are not terminated upon entering prison. The desire to enter into a marriage and the selection of the person to whom the commitment is made has no relationship to the ability of prison officials to operate a prison. It involves only the right to a time-honored associational status and to establish that philosophical and emotional commitment which this Court recognizes is a traditional and basic yearning of the human spirit. *See Bowers v. Hardwick*, 106 S. Ct. at 2844; *Zablocki v. Redhail*, 434 U.S. at 383-86; *Griswold v. Connecticut*, 381 U.S. at 468. Although the fact of marriage carries with it significant meaning in the minds and emotions of the married individuals, to prison officials it results primarily in a change of status from single to married. The regulation restricts the ability to enter into that new status. Since that status is not naturally restricted by confinement or antagonistic of penological goals, there is no reason for the Court to defer to the untrained and arbitrary decisions of prison officials as to the acceptability of the marriage partners or the merits of the marriage decision.[13]

C. A Heightened Standard of Review Applies to the Deprivation of Fundamental Rights in Prison.

The Court recognized in *Procunier v. Martinez*, 416 U.S. 396, 409 (1973), that where prison officials attempt to prohibit the exercise of a fundamental right that is not necessarily limited by confinement or penological goals, a heightened standard of review should apply.

In *Martinez*, the Court established a heightened scrutiny standard of review for prison regulations censoring the content of letters sent by non-prisoners and inmates alike. 416 U.S. at 413. The Court recognized that the right of free expression and communication is neither inconsistent with a person's status as

13 Prison officials nonetheless would be able to regulate activities of the marital partners in prison, such as access to furlough programs, visitation, and conjugal visit programs.

prisoner nor incompatible with penological goals. *Id.* at 412. The Court stated that any intrusion on protected speech rights must be unrelated to the expression of suppression. *Id.* at 413. Accordingly, the Court established a standard of review for *incidental* restrictions on retained fundamental rights necessitated by the demands of legitimate penological concerns. *Id.*

The Court thought it was unnecessary to reach the question of the standard of review applicable to inmates' first amendment rights and instead decided the issue based on the regulation's effect on non-prisoners. *Id.* at 408-09. The Court held that such incidental restrictions "must further an important or substantial governmental interest [and] be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. In formulating that standard, the Court expressly weighed the demands of the prison setting in light of the Court's firm policy of deference to prison officials. *Id.* at 404-05. The *Martinez* standard therefore reflects the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution" for incidental restrictions on retained fundamental rights. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1973).

Even when non-prisoner rights have not been involved, the Court has invoked the same demanding standard of review in evaluating prohibitions on other fundamental rights of inmates. *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. at 133. In *Jones*, the Court considered the constitutionality of the outright ban on union organizational activities. The Court upheld the prohibition, stating that "the regulations are drafted no more broadly than they need to be to meet the perceived threat—which stems directly from group meetings and group organizational activities of the Union." 433 U.S. at 133, citing (*Procunier v. Martinez*, 416 U.S. at 412-16). Thus, even with respect to rights that must be limited in prison, such as association, the Court has applied the *Martinez* least restrictive alternative requirement where a particular exercise was altogether foreclosed. In *Pell v. Procunier*, the Court stated

clearly that the demands of confinement and security "would not permit prison officials to prohibit all expression or communication by prison inmates . . . ." 417 U.S. at 817.

A standard of heightened scrutiny applies to petitioners' regulations and practices under *Martinez* and *Jones*. Like the speech right in *Martinez*, marriage is not inherently limited by confinement or detrimental to penological objectives and therefore may be subject only to incidental restrictions in furtherance of legitimate penological objectives. In addition, arrogating to prison officials the absolute right to make important marriage decisions constitutes a form of censorship comparable to that in *Martinez*. If prison officials cannot dictate what a person can communicate to his chosen spouse in the absence of a substantial justification, they certainly should not be allowed to determine whether that person would make a worthy marriage partner without comparable justification.

In addition, like the ban in *Jones*, the denial of the right to marry the chosen spouse constitutes an absolute deprivation of the constitutional right to make a marriage decision and form a marital relationship. Since the Court in *Jones* applied a demanding standard of review to regulations governing the right to associate which by its nature must be restricted by confinement, there is even greater reason to apply it in this case where the right is not so restricted.

Consistent with this view, every lower court concluding that inmates possess a fundamental right to marry has applied the *Martinez* or stricter standard to evaluate restrictions on the right in the prison setting. *See Safley v. Turner*, 777 F.2d at 1313; *Bradbury v. Wainwright*, 718 F.2d at 1540; *Lockert v. Faulkner*, 547 F. Supp. at 608-09; *Salisbury v. List*, 501 F. Supp. at 108; *In re Carrefa*, 77 Cal. App. 3d at 851; *Vance v. Rice*, 524 F. Supp. at 1299.

The *Martinez* standard should apply here for the additional reason that the Missouri marriage regulations, like the correspondence regulation in *Martinez*, implicates the rights of

non-prisoners as well as inmates.[14] A non-prisoner spouse-to-be who is not permitted to marry the chosen individual suffers an abridgement of the right to marry as plain as that which results from denying the inmate the right to marry. *See* Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275 (1985). It would be inconsistent with *Martinez* were the rights of non-prisoner spouses, unlike non-prisoner correspondents, relegated to an undemanding standard of review of the abridgement of a fundamental right because of the identity or status of the person with whom the non-prisoner chose to exercise the right.

Petitioners' assertion that "there is little reason to apply the [*Martinez* test] after the advent of" *Jones, Wolfish* and *Rutherford* rests upon an erroneous conclusion that those decisions settled the issue expressly reserved by the Court in *Martinez*—the standard of review applicable to prisoner's fundamental speech rights and, by implication, other fundamental rights not necessarily effected by confinement. Pet. Br. at 31. To the contrary, the Court found the regulation in *Wolfish* restricting receipt of hardcover books to be only a content-neutral time, place and manner restriction "barely implicating speech rights." *Jones*, 433 U.S. at 130. *Rutherford* did not involve fundamental speech rights at all, but rather association rights. And in *Jones*, the Court applied the least restrictive alternative analysis to the ban on organizational activity. Accordingly, the Court's decisions in those cases stand as an adoption, not an implicit rejection, of the applicability of the *Martinez* standard for inmates seeking to exercise retained fundamental speech rights or fundamental liberty interests.

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14 Petitioners recognize that the regulations at issue govern inmates seeking to marry non-inmates. Pet. Br. at 40. In addition, one inmate witness testified at trial that she was prohibited under the regulations from marrying a non-inmate. Vol. III at 67-68. And immediately after trial petitioners denied respondent Henderson's request to marry a non-inmate. Resp. Br. at 18.

Moreover, in propounding the "reasonableness" standard in *Wolfish*, this Court rejected a compelling-necessity standard only insofar as an abstract due process right was claimed. 441 U.S. at 534. The Court distinguished the due process right in that case on the ground that it "[does] not rise to the level of those fundamental liberty interests delineated in such cases as *Roe v. Wade*, 410 U.S. 113 (1973)," and its progeny. *Id.* at 534-35. Under *Zablocki*, the right to marry is such a fundamental liberty interest. By comparing the abstract due process rights asserted in *Wolfish* to other fundamental individual liberty interests, the Court must have viewed such liberty interests to be in a different category than those rights not important enough for a heightened standard of review.

The Court has recognized that the exigencies of governing persons in prison, while different from those governing others, do not eliminate the need for reasons imperatively justifying the nature and scope of a deprivation of a fundamental constitutional right. *Martinez*, 416 U.S. at 413, 424; *cf. Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 506-09 (1969). Although the prison setting affects the *degree* of intrusion that the Constitution will tolerate on the free exercise of a fundamental right in that environment, it does not determine the *standard* applicable to judicial review of that intrusion. Where the right is not naturally restricted by confinement or detrimental to legitimate penological interests, such as speech and marriage, it survives incarceration. *Bell v. Wolfish*, 441 U.S. at 545-46. Under those circumstances, the standard established in *Martinez* for evaluating incidental restrictions on retained fundamental rights should apply.

POINT III

APPLYING THE STANDARD OF HEIGHTENED SCRUTINY TO MARRIAGE REGULATIONS WILL NOT UNDULY BURDEN PRISON ADMINISTRATION.

Applying the *Martinez* standard to the marriage regulations will not unduly burden prison officials in taking necessary actions to address any legitimate institutional concerns. Petitioners certainly are entitled to address the asserted concerns—escape and violence—as they would if those activities were engaged in by any other inmate.[15] The existence of a marital relationship is irrelevant to the unacceptable conduct. Obviously, if the threats exist at all, they exist whether or not a marriage occurs.

Moreover, petitioners have at their disposal a full range of measures for controlling conduct without prohibiting the formation of a marital relationship, such as the use of disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539; administrative confinement based on no more than rumor or surmise, *Hewitt v. Helms*, 459 U.S. 460 (1983); restrictions on correspondence upon a proper showing, *Procunier v. Martinez*, 416 U.S. 396; administrative transfers, *Meachum v. Fano*, 427 U.S. 215 (1976); cell and body searches, *Bell v. Wolfish*, 441 U.S. 520; restrictions on visitation, *Rutherford*, 468 U.S. 576, to name a few. Far from stripping petitioners of the ability to take action necessary to maintain security, order or rehabilitation, apply-

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15 Petitioners also assert an interest in "rehabilitation" and argue that courts should defer to the judgment of prison officials that a particular marital relationship would be detrimental to rehabilitation. Pet. Br. at 30. However, petitioners' insistence on judicial deference finds no support in the decisions of this Court. In *Wolfish*, *Rutherford* and *Jones*, this Court emphasized that prison officials, by virtue of their training and experience in running prisons, possessed unique expertise on corrections matters. By contrast, prison officials have no expertise in marriage, family, psychological or spiritual counseling to warrant deference to their judgments as to whether a particular marital relationship will be beneficial for the spouses-to-be.

ing the *Martinez* standard will have only the effect of invalidating unnecessary action or actions which sweep unnecessarily broadly.

In addition, applying the *Martinez* standard to state action affecting an inmate's decision to marry either a non-prisoner or another inmate will not prevent prison administrators from dealing with the greater or lesser threats to safety, security or rehabilitation that each may entail. If, as petitioners contend, "the security concerns are different when dealing with two incarcerated felons" (Pet. Br. at 40), then the scope of the necessary state action will be commensurately different. Applying the *Martinez* standard to both situations will simply mean that prison officials make take appropriate action, short of denying requests to marry where less restrictive measures will suffice.

CONCLUSION

Marriage is a fundamental right that does not cease to be protected by the Constitution upon confinement in prison. The Correctional Association has found, as have the New York State Department of Correctional Services and numerous other penological experts, that marriage has a highly positive influence in the prison environment. Regulations and practices frustrating or preventing marriage in prison, such as those of the Missouri Department of Corrections, disserve penological goals and constitute an unnecessary intrusion on the constitutionally protected right to marry. Accordingly, the decision of the Eighth Circuit, applying a heightened standard of review under *Procunier v. Martinez* in evaluating the regulations and practices of the Missouri Department of Corrections, should be affirmed.

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Respectfully submitted,

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